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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 40

MARGARET JOHNSON, as Administratrix of the goods, chattels and credits of CHARLES JOHNSON, deceased,

Petitioner,

v.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD CO.

BRIEF FOR PETITIONER

JACQUIN FRANK,
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The Opinions of the Courts Below

The District Court for the Eastern District of New York, by Judge MATTHEW T. ABRUZZO, filed an opinion on June 20, 1951, which is not reported (R. 159-164).

The opinion of the United States Court of Appeals for the Second Circuit was filed on February 4, 1952, and is reported in 194 F. 2d 194 (R. 171-175).

Jurisdiction

The action was brought under the Jones Act (46 U. S. C. 688), claiming damages for wrongful death.

The judgment of the Court of Appeals was entered on February 4, 1952. The petition for a writ of certiorari was filed on April 22, 1952, and it was granted on June 9, 1952. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Question Presented

Where the plaintiff had a verdict in an action under the Jones Act for wrongfully causing death, the question presented is:

> Whether the plaintiff can be deprived of a jury trial by the Court of Appeals reversing the judgment entered upon plaintiff's verdict and directing a verdict for the defendant, although the defendant had failed to move for judgment notwithstanding the verdict under Rule 50(b) of the Federal Rules of Civil Procedure.

The petitioner, in her application for a writ of certiorari, prayed for a reversal and reinstatement of the jury verdict upon the ground that the Court of Appeals erred in holding as a matter of law that there was insufficient evidence of causal relationship between the negligence found by it and the death of the deceased. She also contended that the Court of Appeals erred in reversing the judgment and directing a judgment for the defendant in violation of Rule 50(b) of the Federal Rules of Civil Procedure.

This Court in granting certiorari limited the issues to the application of Rule 50(b).

Statutes Involved

The Federal Rules of Civil Procedure provide in Rule 50(b):

"Rule 50(b). *Reservation of Decision on Motion.*

Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. *Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict;* or if a verdict was not returned such party, within ten days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. *If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed.* If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial." (Italics ours.)

Statement of the Case

The applicability of the above rule cannot properly be evaluated without a statement of the case and the various procedural steps taken in the District Court. It is also essential to put in its proper context the action of the Court of Appeals in erroneously directing a verdict for the defendant.

This action was brought under the Jones Act on behalf of the widow and children of a merchant seaman for wrongful death.

The facts giving rise to the cause of action are as follows:

Petitioner's intestate, Charles Johnson, came to his death by drowning while employed by respondent, The New York, New Haven and Hartford Railroad Co., while acting as a floatman on defendant's tug "Transfer #10", while the tug with its captain and crew was engaged in removing two empty car floats from slips or bridges maintained by the respondent at Oak Point in the East River in the Borough of Bronx, City and State of New York (R. 11-12). Johnson was found to be missing shortly after the car floats were moved away from their slips or bridges. Nevertheless, the tug and car floats proceeded to their destination some 500 feet away, and then, upon their return, 25 minutes later, the captain and the mate began to search for Johnson and found his body floating some 3 feet away from the very bridge to which one of the car floats had been originally secured (R. 44, 45, 46).

The case was tried before District Judge MATTHEW T. ABRUZZO and a jury on April 10, 1951, and resulted in a verdict for the plaintiff in the sum of $20,000 on April 13, 1951, and a judgment on the verdict was entered in the United States District Court, Eastern District of New York, on April 13, 1951.

The complaint originally alleged negligence in the operation of the tug and tow and also alleged negligence for failure to furnish Johnson with a "safe and secure place in which to work" (R. 5). Upon the trial, the complaint was amended by further alleging defendant's negligence for the failure of the captain to use reasonable efforts and care in attempting to rescue plaintiff's intestate when he was found to be missing from the float (R. 9). The District Judge refused to submit the question of "safe place" and the failure to exercise reasonable care in attempting to rescue petitioner's intestate, but confined the issue submitted to the jury solely to the negligence in the manner in which the tug and floats were operated by Johnson's fellow servants, the captain and the mate (R. 133-134). The accident occurred on April 22, 1946, during the

maneuver of removing the floats from bridges 11 and 12. The transcript of record opposite pages 146 and 148 shows photographic reproductions of both floats, #53 and 58, as well as the two bridges or slips involved in the accident. Car float 53 was secured to bridge 11 and car float 58 to bridge 12, and each one of them was lying bow in (R. 17). The car floats are 340 feet in length and 40 feet wide. Between the two bridges 11 and 12 is a pier about 50 feet long, referred to in the testimony as the "short rack". On the outer side of the two bridges were two piers known as "long racks", and the two floats were secured to the short rack by lines called "short racklines" and to the long pier or long rack by long racklines (R. 17, 18, 19, 21-22).

All the factual testimony was given by the captain and the mate. Both of them were still in the employ of the defendant at the time of the trial and both of them were charged with negligence in the operation. Nevertheless, plaintiff was constrained to use their testimony in establishing her case. From both of these witnesses the operation involved was fully developed.

When the tug came alongside of float 53, the mate and Johnson, the floatman, stepped aboard that float. The mate's duty required him to remain at the stern preparatory to throwing a line across the two floats at the stern. Johnson walked towards the bow, where he was to perform certain acts (R. 17-18). That was the last time he was seen alive. He was required to remove the short rackline at the port bow of the 53. Apparently he did so. He then was required to step across between the two bridges and board the 58 to perform a similar operation, i.e., remove the short rackline on the 58 where it was secured to bridge 12 (R. 18, 20-21, 25).

It is true that the short rack seen on photograph Plaintiff's Exhibit 2, opposite page 148 of the record, obstructs the captain's view of Johnson when he is unloosening the short rackline at bridge 12. The captain therefore awaits a signal from him indicating that the line or lines are gone. The customary signal is "All gone". Then he proceeds ahead (R. 55, 65-66, 70).

The entire controversy in both district court as well as in the court of appeals, seemed to hinge upon whether or not that signal of "all gone" was given by Johnson or by a "bridgeman". The only witnesses, the captain and the mate, testified that *they did not recognize Johnson's voice.* Both admitted that while they did not *see* bridgemen present, one of the bridgemen may well have given the signal (R. 28-29, 55-56, 71, 92). The "all gone" signal is not only used by the floatman (Johnson) but also by bridgemen (R. 45). The mate so stated on direct examination but then changed it under a highly leading question put to him by his employer's counsel (R. 45-46). The jury, of course, had a right to and did accept his first answer.

The Custom

The captain, although he did not recognize the author of the signal, nevertheless started ahead with the floats. The danger of proceeding ahead before the captain knew that the signal came from Johnson was forcefully described by Captain Holmes, a tugboat operator in the Harbor of New York, of more than thirty years' experience (R. 75-76).

Unlike the long rackline, with an eye that is thrown off by a bridgeman (R. 22-23), the short rackline is actually tied around the bitts by snake loops, or turns (R. 54), which required Johnson to unwind the line. There being no eyewitnesses, no one knows, of course, at what moment in the process of unwinding, the float started to pull ahead. Without actually knowing that Johnson was in a position of safety, the danger in starting to pull away from the bridge is that the man on the line may get tangled up in the line, either by getting his hands or his feet caught, and thereby fall overboard (R. 82-83).

The Court of Appeals in its opinion stated that it was a legitimate inference that Johnson went ashore and crossed over to the 58 and "had at least loosed the short rackline, since the float was pulled out without breaking it". It also

agreed that it is "a more reasonable inference that he accidentally fell from the 58" (194 F. 2d 194, 197).

The negligence charged was that it was the captain's duty to ascertain the author of the "all gone" signal by sending a man over to where he could have a clear view of the floatman before starting to pull out, and that he failed to do so.

The only issue submitted to the jury was whether or not there was a well-recognized custom, under the circumstances here, that the captain was bound to conform with (R. 134). The plaintiff by competent testimony showed that where the captain does not recognize the author of the signal and cannot see him it is customary to send someone over in a position where he could look down towards the boy, here the mate, and find out whether it was safe to proceed (R. 79, 80, 81-83). The float is only forty feet wide and the mate could easily have walked over to a point where he could see Johnson and ascertain whether or not *he* gave the signal (R. 81). That was only a matter of a few feet, as can be seen from the photographs (R. 146, 148). This procedure was not only customary (R. 79, 80, 81-83) but nothing novel nor unusual (*Southern Ry. Co.* v. *Hermans*, 44 F. 2d 366, 64 F. 2d 237 (C. C. A., 4th Cir.). The defendant denied the existence of such a custom but admitted, through its expert, that under certain conditions it is necessary to ascertain the position of the floatman (R. 115-116). The jury by its verdict found that there was such a well-recognized custom which was violated by the captain and that such violation caused Johnson's death.

The Court of Appeals, on the other hand, although it accepted the district court's findings of the existence of the custom and the violation thereof, substituted its finding of causal relationship by stating "it is at least equally reasonable to infer that Johnson did give the signal for the tug to start, and thereafter stumbled or for some other unknown cause fell and knocked himself unconscious" (R. 175). Of course, *if it was an equally reasonable inference that Johnson himself gave the signal, and in some way fell,*

then the jury's inference that he did not give the signal, based upon some very cogent testimony, could not and should not be disturbed (*Pollard* v. *Seas Shipping Co.*, 146 F. 2d 875; *Sadler* v. *Pennsylvania R.R. Co.*, 159 F. 2d 784; *Tenant* v. *Peoria-Pekin Union Ry. Co.*, 321 U. S. 29).

While the Court of Appeals made its finding of no causal relationship between the negligence found and the death of Johnson purely on conjecture and on inference unwarranted by the testimony, the jury on the other hand, in connecting the death of Johnson to the unwarranted movement of the floats was amply justified by the record. The Court of Appeals' finding was based entirely upon an erroneous interpretation of all the testimony involving the vital issue as to whether or not Johnson and not one of the bridgemen gave the all-important "all gone" signal. If one of the bridgemen gave it to indicate that his lines were gone, then that was no signal to the captain to go ahead, because Johnson may have been in the very act of unwinding the line from the bitts. Basing its conclusion that it was most likely Johnson that gave it, the lower court found comfort in the testimony to the effect that no witnesses "observed" any bridgemen there (R. 175). The court's conclusion is a *non sequitur*. It overlooked that in operations of this kind the men on the tug (Captain O'Brien and the mate) become so accustomed to the presence of people on shore that they pay very little attention to them, and the mere fact that they did not *see* bridgemen does not preclude the fact that they were there. Captain O'Brien specifically stated:

> "Q. Well, there are bridgemen there whether you see them or not, aren't there? A. Yes" (R. 92).

Furthermore, the mate testified that the reason he did not see any bridgemen there was that he was walking in the other direction (R. 42). On the other hand, that the more reasonable inference is that a bridgeman gave that fatal signal is buttressed by uncontradicted testimony. O'Brien stated that he did not know whether or not the

signal was given by a bridgeman (R. 64-65); that Johnson's normal duties involved removing only the short racklines and not the long racklines (R. 68)—therefore, there must have been a bridgeman present, because otherwise the floats could not have been moved away without the removal of the long racklines; that it is the duty of the bridgeman to throw off the long racklines (R. 21-22); that if Johnson had removed the long racklines, he would have been seen by either the captain or the mate, as both could see the starboard side of the float; and that it may well have been a bridgeman who shouted "all gone" (R. 92).

Furthermore, Johnson was an experienced man. He knew the danger of giving the "all gone" signal while he was still unloosening the short rackline. There is always a presumption that the deceased did not act negligently. *Tenant* v. *Peoria & P. Ry. Co.*, 321 U. S. 29, at p. 34. The court below would destroy that presumption by its unreasonable inference that Johnson deliberately or negligently put himself into a position of danger by giving the signal before he was ready. The Court says that he may have stumbled (R. 175). That is a possibility—but it was for the jury to say whether that was brought about by the negligent operation of the tug at a time when it had no right to start pulling the float away from the bridge until the captain had learned the identity of the author of the signal.

As against that strained inference by the Court of Appeals, the jury had ample evidence to support its finding of cause and effect. It is not at all essential that the facts and circumstances should *compel* an inference of causal connection, but rather that they *permit* such an inference.

The Court of Appeals failed to give consideration on the question of causal relationship that on appeal, in reviewing a judgment n.o.v., the appellate court must consider the evidence from the strongest viewpoint of the successful party below and give that party the advantage of every fair and reasonable intendment which the evidence could justify (Moore's Fed. Pract.—2nd Ed., Vol. 5, pp. 2346-7). All inferences that reasonably may be drawn from the evi-

dence must be resolved in the plaintiff's favor. *Meyers* v. *American Well Works* (C. C. A., 4th Cir.), 114 F. 2d 252, 253; *Nielsen* v. *Richman* (C. C. A., 8th Cir.), 114 F. 2d 343, 345; *Gunning* v. *Cooley*, 281 U. S. 90; *Peoria, etc.*, supra. Rule 50(b) did not change this.

The appellate court is not free to set aside a jury verdict merely because the jury could have drawn different inferences or conclusions or that the court regards another inference as more reasonable. *McLeod* v. *Union Barge Line*, 95 F. Supp. 366. Here the lower court said it was equally reasonable.

Shortly after the floats cleared the rack, Johnson was found to be missing (R. 36). It was still necessary for him to complete his part of the operation by securing the two floats to each other at the bow bitts by a line. Captain O'Brien, not seeing Johnson on board, directed the mate to do Johnson's job (R. 36-37). The tug proceeded ahead, completed its operation some 500 feet away and then returned some 25 minutes later (R. 40, 61). A search instituted for Johnson found his body floating some 3 feet from the apron of the bridge to which the 58 had been originally secured (R. 45, 63). It was the petitioner's contention upon the trial that the question of the failure of the personnel of the tug to attempt to rescue Johnson after it had learned of his absence was an issue of negligence that should be submitted to the jury (R. 29-30, 83-85). The District Court refused, and also refused to submit the question of the failure to furnish a safe place, despite testimony by one of the witnesses that the deck of the float was covered with oil (R. 38). It limited the issues of negligence to the sole question as to whether or not there was a custom which required Captain O'Brien to ascertain the author of the signal "all gone" when his view was obstructed and whether or not the failure to do so caused Johnson's death (R. 137-139, 162).

The jury, on that issue, found a verdict in favor of the plaintiff.

The Procedural Steps in the District Court

The defendant at the trial took the following steps:

At the end of the plaintiff's case it moved to dismiss on the ground that the plaintiff failed to prove negligence, failed to make out a prima facie case, and "failed to put in sufficient proof to avoid the dismissal of the complaint at this stage" (R. 102). The court reserved decision on that motion (R. 105).

At the end of the entire case the defendant renewed the motion to dismiss and also asked the court to direct a verdict in its favor upon two grounds and only those:

1. That there was no proof of negligence.
2. That the deceased himself was responsible for his own death.

Again decision was reserved (R. 133-134).

Under subdivision (a) of Rule 50, the defendant is required to state the specific grounds for his motion for a direction of verdict. The only grounds relied upon by the defendant here was negligence and contributory negligence. On the other hand, the only ground for the reversal of the judgment by the court of appeals was that there was not sufficient evidence as to causal connection between the negligence and the death. That was neither urged nor mentioned as a ground for a direction. The reason for the requirement is well set forth by Circuit Judge Parker (*Atlantic Greyhound Corp.* v. *McDonald* (C. C. A., 4th Cir.), 1942, 125 F. 2d 849, 850, and *Virginia etc.* v. *Dunbar*, 106 F. 2d 383, 385). In the *Virginia* case, Judge Parker stated: "And we think it important that this requirement of the rule be observed, particularly in view of the enlarged powers granted the court with respect to such motions by Rule 50(b), as otherwise judgment might be entered on such a motion after the close of the trial and on a ground which could have been met with proof if it had been sug-

gested when the motion was made. We do not mean to say that technical precision need be observed in stating the grounds of the motion, but merely that they should be sufficiently stated to apprise the court fairly as to movant's position with respect thereto."

Upon the rendition of the verdict in plaintiff's favor, the defendant then moved to set aside the verdict on the ground "that it is contrary to the law and contrary to the evidence and contrary to the weight of the evidence and excessive" (R. 145). The court immediately held that the verdict was not excessive, but again reserved decision on that motion (R. 145). These were the procedural steps taken by the defendant.

Later the District Court sustained the jury verdict (R. 164).

It is petitioner's contention that the District Court had the function of determining under these conditions whether or not to set aside the verdict and have a retrial or to take any other step. That under Rule 50(b), the defendant having failed to move for judgment notwithstanding the verdict, the Court of Appeals could reverse but could not direct a verdict for the defendant.

Specification of Errors

The learned Court of Appeals for the Second Circuit erred in the following respect:

After finding the existence and the violation of the custom which required the captain to ascertain the author of the "all gone" signal and holding that there was no causal relationship between such negligence and the death of Johnson, the court not only reversed but directed that a verdict be entered in favor of the defendant. The Court of Appeals had no power to do so under Rule 50(b).

Summary of Argument

This history of the rule clearly demonstrates that it was born out of the confusion that existed prior to its adoption. The original committee formulating the new federal rules was faced with a not too mild dilemma by two cases in the Supreme Court—*Slocum* v. *New York Life Insurance Co.* (1913), 228 U. S. 364, and *Baltimore and Carolina Line* v. *Redman* (1935), 295 U. S. 654. In the *Slocum* case the Supreme Court found that a Pennsylvania statute as applied in federal courts under the terms of the Conformity Act and which permitted the trial court to render judgment *non obstante veredicto* was violative of the Seventh Amendment of the Federal Constitution. There was a strong dissent by the then Mr. Justice Hughes.

In *Baltimore and Carolina Line* v. *Redman*, supra, the Supreme Court distinguished the *Slocum* decision by holding that whereas in the *Slocum* case the motion made at the end of all the evidence was denied, in the *Redman* case decision on the motion was reserved, and therefore not only the trial court could have set aside the verdict and entered judgment in favor of the aggrieved party, but, on review, the appellate court could do likewise.

In Volume 34 of Michigan Law Review (1935), pages 93 to 100, the confusion that existed is commented upon. Other well-known commentators such as Thorndike in *Trial by Jury in the United States Courts*, 26 Harv. L. Rev. 732 (1913); Thayer, *Judicial Administration*, 63 U. of Pa. L. Rev. 585, 600-601, and Scott, *Trial by Jury in the Reform of Civil Procedure*, 31 Harv. L. Rev. 669, 685 (1918), wrote in a critical vein on the subject involving the motion for judgment n. o. v., as enunciated in the *Slocum* case.

We quote from the following significant language of the Michigan Law Review article supra:

> "While, as has been pointed out, but few states have so far provided by express statute for the reservation system of avoiding new trials, the Supreme Court's

opinion in the *Baltimore & Carolina Line* case gives new hope that this method may be used by state courts as well as by the federal courts without legislative authorization, inasmuch as that decision held that the reservation procedure was authorized by the common law. *Indeed, it is to be expected that a rule regulating this procedure will be incorporated in the new federal rules, now in process of formulation.* Certainly it is also to be hoped that the courts will not prove laggard in heeding the possibilities evident in this decision, and that they may readily adopt this means now at hand in a concentrated effort to effect a reduction in the number of costly and stultifying retrials of jury cases." (Italics ours.)

Rule 50 was promulgated in 1937 and stands now as originally adopted. *Prior* to the adoption of the Federal Rules of Civil Procedure, a trial court had certain powers that were recognized either by state statutes within the state where the federal court was located or by common law. It could set aside a verdict and either direct a new trial on the ground of error in the admission of evidence or on the ground that the verdict was against the weight of evidence. It could also direct entry of judgment notwithstanding the verdict on the ground that there was insufficient evidence to support the verdict. But this could be done only if the litigant was careful to move for a directed verdict at the close of the evidence and to *expressly* give the trial court the right to reserve decision on the motion and thereafter (after the verdict) move for judgment notwithstanding the verdict.*

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* *Slocum* v. *New York Life Insurance Co.*, supra; *Baltimore & Carolina Line* v. *Redman*, supra, commented upon infra.

The Purpose of Rule 50(b)

The purpose of the rule was to relieve the strict requirement of an express reservation on the ruling on a motion for a directed verdict and the post-verdict motion for judgment n. o. v. The reservation was made automatic, and the litigant was given a 10-day period in which to move for judgment n. o. v. or for a new trial or both.

But the necessity for still moving for a directed verdict and for judgment n. o. v. not only remained but was specifically provided for by Rule 50(b) (Moore's Fed. Pr. 2nd Ed. Vol. 5, pp. 2327, 2333). Motion for judgment n. o. v. could not be dispensed with because it was important that the trial judge, close to the case, should have in the first instance the opportunity to evaluate what error, if any, he had made during the trial, as well as to evaluate the entire testimony. If he decided that there was no substantial error, or that the testimony was of the necessary weight and sufficiency, he could allow the judgment to stand. If he decided there was error in admission of the evidence, or for some other reason, he could order a new trial. If he felt that the error went to the root of the case, i.e., insufficiency of the evidence to support the verdict, and that he should have directed a verdict, he may do so, providing a motion had been made for judgment notwithstanding the verdict. He may then set aside the verdict and enter judgment for the moving party. This is more than a technical requirement. It goes to the very heart of the litigant's right to a jury trial. It is a salutary and beneficial rule, tending, if anything, to avoid unnecessary retrials. It gives the trial court the opportunity to re-examine the case with calmness and deliberation instead of during the stress and strain of a lengthy jury trial.

The trial judge, since the adoption of the rule, can only exercise all of these three alternatives when the litigant complies with the rule, i.e., moves within 10 days after the rendition of the verdict for judgment n. o. v. Otherwise,

he is restricted to either sustaining the verdict or ordering a new trial. By what right then may an appellate court on the cold record set aside a verdict and direct judgment for the party who by his own omission has failed to give the trial judge the opportunity to act in the first instance? (Moore, supra, p. 2333.)

The vital necessity of giving the district courts an opportunity in the first instance to act upon the verdict is perhaps best illustrated in this very case. Let us assume that upon reconsideration and deliberation the trial court comes to the conclusion that there was a gap in the evidence that could be supplied. He may then order a new trial (*Cone* v. *West Va. P. & P. Co.*, 330 U. S. 212, 217).* On the other hand, during the calm deliberation he may have also concluded that he committed error in limiting the issues submitted to the jury. He may come to the conclusion that he should have submitted the question of the unsafe place due to the accumulation of oil on the float which may well have caused Johnson to slip from the float, or even the failure to make an attempt to rescue Johnson after he had fallen from the float. Under the circumstances, he had a right to set aside the verdict and order a new trial. All of that right was specifically granted to him under the rule. If he was in error in any steps he took, then the reviewing court could correct the error made by him. The reviewing court could not under the rule go further than the district court under the motion as made in this case after the verdict. The Court of Appeals could have reversed and ordered a new trial for errors on the trial; it could have reversed for failure of proof—but it could not direct a verdict where the proper motion was not made.

The trial court in its opinion adopted one of the three alternatives—it sustained the verdict of the jury. Although the question of causal relationship had necessarily to be governed by inferences or even conjectures upon the facts that were elicited, there is ample authoritative justification

* Discussed infra.

for the trial court's holding (*Lavender* v. *Kurn*, 327 U. S. 645; *Tiller, ex.* v. *Atlantic Coast Line R. Co.*, 318 U. S. 645; *Bailey* v. *Central Vermont Ry. Co.*, 319 U. S. 350; *Wilkerson* v. *McCarthy*, 336 U. S. 53). Oft have we been told that the question of causal relationship or proximate cause in a legal sense involves an embarrassing question with metaphysical distinctions and subtleties difficult of satisfactory application in the varied and practical affairs of life. That is the reason for juries! *

Very often the line between proximate and remote consequences is a shadowy one. Very often it is very difficult to determine whether there is such a connection between the wrong alleged and the resulting injury. There again is the necessity of a jury evaluation and not the evaluation on a cold record.

Here the learned Court of Appeals would have us believe that negligence exists in a vacuum. Negligence can only be evaluated by the result it produces, and it is the whole picture that should be taken into consideration.

The rule gives the opportunity to the district court to decide in the first instance whether or not there was sufficient evidence of causal connection to be submitted to the jury. After the verdict, the district court has the power to decide that question providing Rule 50(b) was complied with—a motion must be made within 10 days for direction of judgment notwithstanding the verdict.

Had the proper motion been made and the district court denied it, the Court of Appeals could, on its review of the case, have reversed the district court's ruling and directed a verdict for the respondent here.

But in the absence of the motion the Court of Appeals could do no more than the district court did in exercising its discretion on the alternatives provided by the rule. It could therefore, on the motion as made, set aside the verdict, but it could not direct judgment for respondent notwithstanding the verdict.

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* *Texas* v. *Guidry*, 9 S. W. 2d 284, aff'd 280 U. S. 531.

Argument

In discussing the authorities, we believe our purpose will best be served by commenting upon some of those cases which were decided before the adoption of the Rule and then those that came after. There were many, and we have attempted to analyze only those that apparently seemed to set forth the rationale of the rule.

Prior to the adoption of Rule 50(b) there were two cases in this Court that seemed to clarify the power of both district court as well as appellate court on motions for directed verdict. *Slocum* v. *New York Life Insurance Co.* supra, and *Baltimore and Carolina Line* v. *Redman*, supra.

The *Slocum* case was tried in the U. S. Circuit Court of Pennsylvania. The defendant had moved for a directed verdict, urging that the evidence was insufficient. The trial court denied the motion and plaintiff had a verdict. The Circuit Court of Appeals concluded that the evidence was insufficient and reversed the judgment for the plaintiff and directed that judgment be entered for the defendant. The motion made by the defendant at the end of the entire case for a direction *was denied without reservation.* The Circuit Court of Appeals had failed to leave the question of a new trial or such a direction to the lower court. This Court granted certiorari and held that the direction of a verdict for the defendant by the Circuit Court of Appeals was an infraction of the Seventh Amendment in that the only power that the Circuit Court of Appeals had was to order a new trial.

In the *Redman* case, also decided before the adoption of Rule 50(b), the District Court *expressly reserved its ruling on defendant's motion* to dismiss and for a direction of the verdict. Both motions in the *Redman* case were based upon the ground that the evidence was insufficient to support a verdict for the plaintiff. Plaintiff had a verdict. Thereafter the trial court held the evidence sufficient and entered a judgment for the plaintiff on the verdict. The

Circuit Court of Appeals held the evidence insufficient and reversed the judgment with a direction for a new trial. That court felt itself bound by the holding in the *Slocum* case, apparently overlooking the substantial difference in the two cases. This Court pointed out that the Circuit Court of Appeals had the power to direct a verdict in the *Redman* case because under the reservation the verdict was taken conditionally, it being implicit in the taking of the verdict that the trial court could still rule on the sufficiency of the evidence. In discussing the *Slocum* case this Court stated that the state statute was applicable to trials in the federal courts as long as its application would not affect an infraction of the Seventh Amendment, but that there was such an infraction in that although the Circuit Court could set aside the verdict for error of law, and direct a new trial, it could not itself determine the issues of fact and direct a judgment for the defendant "if this would cut off the plaintiff's unwaived right to have the issues of fact determined by a jury". It also indicated the difference between reserving decision on a motion for a directed verdict and an outright denial of that motion, and held that in the *Redman* case, the trial court having expressly reserved its ruling on the question of insufficiency of evidence, which was a question of law, the verdict taken by the plaintiff was subject to the condition of a ruling thereafter on the question of sufficiency. That made it purely a question of law, and the trial court having committed error, the Circuit Court could correct that error and direct a verdict for the defendant. This Court then held that its holding in the *Slocum* case was not binding in view of the different circumstances and modified the judgment by substituting a direction for a judgment of dismissal on the merits in place of the direction for a new trial.

There were many other cases, but we believe that these two amply illustrate the situation that existed *prior to* the adoption of Rule 50(b).

Here was real confusion—natural and excusable. Something had to be done. Rule 50(b) was promulgated. That set forth a pattern of procedure which stated clearly to courts, litigants and counsel the orderly procedure. No longer was it necessary for courts to reserve and lawyers to consent to such reservation. The reservation became automatic. The court now may deny the motion and still act on the legal question of sufficiency of the evidence and may direct a judgment after the verdict. The rule reads:

> "Whenever a motion for a directed verdict made at the close of the evidence is denied or *if for any reason is not granted* (such a reason, we add, is a reservation), the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion." (Italics ours.)

Now the aggrieved party has another opportunity to have the court reconsider this decision, provided, however, that the aggrieved party has complied with that portion of the rule which provides that he move within ten days after the verdict.

Rule 50(b) remained more or less unchallenged until 1946. At that time the Advisory Committee in its final report dealing with recommended amendments proposed to amend Rule 50(b) by doing away with the necessity of a post-verdict motion for judgment. Not only was that recommendation not adopted, but at that time there was pending in this Court the case of *Cone* v. *West Virginia Pulp and Paper Co.* which was thereafter decided and reported in 330 U. S. 212. We believe that that case clarified the meaning and intent of the rule and indicated clearly why the Supreme Court had rejected the Advisory Committee's proposed amendment.

In that case plaintiff had sued for damages for trespass. The action was tried in the United States District Court for the District of South Carolina and resulted in a verdict for the plaintiff. The defendant during the trial had chal-

lenged the plaintiff's title and possession of the lands and timber in question and these were the crucial issues in the trial. At the end of the entire case the defendant moved for a directed verdict upon the ground that the plaintiff had failed to prove title or possession. The motion was denied and the jury returned a verdict for the plaintiff. The defendant moved for a new trial on the ground of newly-discovered evidence. That motion was denied. The defendant failed to move within ten days for a judgment notwithstanding the verdict under Rule 50(b). The Circuit Court of Appeals for the Fourth Circuit held that there was prejudicial error in the reception of evidence as to title and that without it there was insufficient evidence on the question of title as well as possession, and reversed the case. But the Circuit Court failed to send it back for a new trial and directed that judgment be entered for the defendant. The plaintiff obtained certiorari, challenging the power of the Circuit Court of Appeals to direct a judgment for the defendant.

This Court, by Mr. Justice Black, reviewed a great number of cases which had been decided since the adoption of the Rule.

On three prior occasions the Supreme Court granted certiorari to examine whether there had been sufficient compliance with Rule 50(b) (*Berry* v. *U. S.*, 312 U. S. 450; *Conway* v. *O'Brien*, 312 U. S. 492, and *Halliday* v. *U. S.*, 315 U. S. 94). In all the three cases the court did not find it necessary to pass upon the compliance with the rule for the reason stated in the *Halliday* case, supra:

> "We granted certiorari as we had in *Berry* v. *U. S.* and *Conway* v. *O'Brien*, because of the importance of the question concerning Rule 50(b). However, as in those cases, we do not reach that problem, since we are of the opinion that the evidence was sufficient to support the verdict."

In granting certiorari this time the Court, as in the instant case, limited the question to the applicability of

Rule 50(b) (329 U. S. 701). The question squarely presented was whether or not a party's failure to make a motion for judgment notwithstanding the verdict, as provided for by Rule 50(b), precludes the reviewing court from directing entry of such judgment. The court accepted the Circuit Court of Appeals' finding of prejudicial error in the admission of evidence "without approving or disapproving" and dealt only with the question of procedure as applicable to the circumstances of that case.

Mr. Justice Black made it quite clear that it was the belief of the Supreme Court that the practice which had been proposed by the Advisory Committee in its proposed amendment to Rule 50(b) and which seemed to have been followed by some of the circuit courts of appeal, that an appellate court could order final judgment in accordance with a motion for a directed verdict made at the end of the testimony, although no post-verdict motion for judgment under Rule 50(b) was made in the District Court, was not only not authorized by the rule but was furthermore not a sound practice. It was pointed out that the wording of the rule permits the trial court to reopen the judgment and *either* order a new trial *or* direct the entry of judgment as if the requested verdict had been directed. "This 'either or' language means what it seems to mean—namely that there are circumstances which might lead the trial court to believe that a new trial rather than a final termination of the trial stage of the controversy would better serve the ends of justice. In short, the rule does not *compel* a trial judge to enter a judgment notwithstanding the verdict instead of ordering a new trial; it *permits* him to exercise a discretion to choose between the two alternatives * * *. Exercise of this discretion presents to the trial judge an opportunity, after all his rulings have been made and all the evidence has been evaluated, to view the proceedings in a perspective peculiarly available to him alone".

The Court further pointed out some practical reasons for not foreclosing a litigant's right to a new trial, such as

failure of certain proof which could easily be supplied. To the suggestion that the petitioner should have presented affidavits to the Circuit Court of Appeals to support his claim for a new trial and that the court could then have remanded such a question to the District Court, Mr. Justice Black pointed out that such a circuitous move should not be approved, that the provision of the Rule is much better practice, and that submitting such a question to the Circuit Court of Appeals would by-pass the District Court, wherein the primary discretionary responsibility was put. This Court then held that the respondent having failed to submit a motion for judgment notwithstanding the verdict to the trial judge so that he might determine whether to direct or order a new trial, the appellate court was without power to direct the District Court to enter judgment contrary to the jury verdict.

Later on, in *Globe Liquor Co.* v. *San Roman* (1947), 332 U. S. 571, the Court re-emphasized the importance of having the District Court first pass upon whether there should be a final determination of a suit. In that case both sides had moved for a directed verdict and the District Court granted plaintiff's motion. The Circuit Court of Appeals thought that there was a distinction between a jury verdict and a directed verdict. Here again the litigant failed to move under Rule 50(b). Nevertheless the Circuit Court reversed and directed judgment for the defendant. Certiorari was granted to consider the apparent inconsistency between this latter action of the Circuit Court and the Supreme Court's holding in the *Cone* case. The Supreme Court held that the Rule applies equally to cases where the verdict was directed or where the jury determined a verdict. Then the court re-emphasized its holding in the *Cone* case: "*Determination of whether a new trial should be granted or judgment entered under Rule 50(b) calls for the judgment in the first instance of the judge who saw and heard the witnesses and has the feel of the case, which no appellate printed transcript can impart.*" (Italics ours.) This Court approved the judgment of the Circuit Court

of Appeals in reversing and remanding, but since the respondent failed to comply with Rule 50(b) it was held error to direct the District Court to enter judgment in respondent's favor, and therefore a new trial was ordered.

In *Fountain* v. *Filson*, 336 U. S. 681, this court explained the holding in the *Globe Liquor* and *Cone* cases as follows:

> "* * * judgment could not be given in the court of appeals in favor of a party who had lost in the trial court and who had not there moved for such relief. *One of the reasons for so holding was that otherwise the party who had won in the trial court would be deprived of any opportunity to remedy the defect which the appellate court discovered in his case. He would have had such opportunity if a proper motion had been made by his opponent in the trial court*" P. 683. (Italics ours.)

The Effect of the Defendant's Failure to Comply With the Rule.

The only motion made by the defendant after the reception of the jury's verdict was to move to set it aside because "it is contrary to the law and contrary to the evidence and contrary to the weight of the evidence and excessive" (R. 145). In effect, this is a motion for a new trial. It was not a motion n. o. v.

In *Missouri Pacific R. Co.* v. *Baldwin* (C. C. A. 8th) 1941, 117 F. (2d) 510, although the reviewing court found error in the trial court's failure to direct a verdict for the defendant, it found itself obliged to send the case back for a new trial. There, as here, the defendant failed to move under the rule. The court stated, "But as the only motion of the railroad company after the verdict was for a new trial, the judgment is reversed for the errors we have pointed out and the cause is remanded for a new trial" (P. 515).

The above obviously followed the pattern set by this Court in *Montgomery Ward* v. *Duncan*, 311 U. S. 243.

Despite the attempt in 1946 of the Advisory Committee recommending to the Supreme Court an amendment of Rule 50(b), so that an appellate court would have the power to give final judgment in accordance with the motion for a

directed verdict, although no motion n. o. v. was made under Rule 50(b), the Supreme Court refused to adopt this recommendation (Moore's Federal Practice, 2d Ed., volume 5, p. 2335).

On appeal, the appellate court can do no more than the trial court.

Montgomery Ward Co. v. *Duncan*, supra;
Binder v. *Commercial Travelers, etc.* 165 F. 2d 896, 902;
Garman v. *Metropolitan Life Ins.* (C. A. 3d) 1949, 175 F. (2d) 24.

In the *Binder* case, supra, the Circuit Court of Appeals for the 2nd Circuit in its original decision had reversed and directed a verdict for the plaintiff although no motion was made n. o. v. Defendant moved for a rehearing. Circuit Judge Clark on the petition for a rehearing agreed with the defendant's position that the power of the reviewing court was limited because of the failure to move under Rule 50(b), and granted a new trial. The court felt itself obliged to follow that procedure under the *Cone* case, and stated that it could not "interfere with the judge's discretionary power in ordering a new trial", page 902.

In the *Garman* case the Court of Appeals for the 3rd Circuit again had to deal with the failure of the defendant to move n. o. v. under the rule. The district court had directed a verdict for the defendant. The reviewing court agreed that on the merits such a verdict was justified. However, in view of the defendant's failure to comply with the rule, the circuit court reversed and remanded the cause for a new trial.

There is all the difference in the world between a motion to set aside the verdict and a motion for a direction notwithstanding the verdict. In the first instance, the trial court deals essentially with either errors of law during the trial, which could be avoided upon a retrial, or most of the time with the question of the weight of the evidence. On the other hand, in the second instance, the trial court deals

with a question of law. This time it is not a question of weight of evidence but sufficiency of evidence from which a legal basis could be found. *Marsh* v. *Illinois Cent. R.*, 175 F. 2d 498; *Adams* v. *U. S.*, 116 F. 2d 199, citing *Mt. Adams and E. P. Inclined R. Co.* v. *Lowery*, 74 F., 463, 476.

The purpose of the rule was perhaps best expressed in *Montgomery Ward* v. *Duncan*, supra, wherein it was stated that the rule "merely renders unnecessary a request for reservation of the question of law or a formal reservation; and in addition regulates the time and manner of moving for direction and of moving for judgment on the basis of the refusal to direct. It adds nothing of substance to the rights of litigants heretofore existing and available through a more cumbersome procedure".

Simply stated, the rule is that if a party moves for a directed verdict at the close of all the evidence and a verdict and judgment is rendered against him, he may, without moving for judgment notwithstanding the verdict, question the legal sufficiency of the evidence on appeal. *If his contention is sustained, the appellate court must remand for a new trial.* If, on the other hand, within ten days he has also moved for judgment notwithstanding the verdict, the appellate court may order judgment in his favor (Moore's Federal Practice, 2nd Ed., Vol. 5, p. 2333).

The Proper Procedure

Where proper procedure was followed in the trial court by compliance with the rule, the reviewing court was able to reverse and grant judgment n. o. v. (*Mass. Mut. Life Ins. Co.* v. *Smith*, 193 F. 2d 511, 513). To the same effect, *Venides* v. *United Greek etc.*, 168 F. 2d 681, 683-684.

As an example of proper procedure and compliance with the rule giving both district courts and appellate courts the power to act is the case of *Raudenbush* v. *Baltimore and Ohio Railroad*, 63 F. Supp. 329, 160 F. 2d 363. This was an action under the F. E. L. A. and also under the Safety Appliance Act. The trial court refused to submit the question under the Safety Appliance Act, but did submit the

question of negligence and causal relationship under the F. E. L. A. The jury returned a verdict in favor of the plaintiff after the defendant had moved for a direction of the verdict. In compliance with the rule, the defendant then moved for judgment n. o. v. The trial court upon reconsideration analyzed the testimony and came to the conclusion that the evidence was insufficient and set aside the verdict and directed judgment in favor of the defendant. On appeal the Circuit Court of Appeals for the Third Circuit (1947) found that the district court's decision on the question of negligence was correct, but also found that the question as to causal relationship under the Safety Appliance Act, under the proof and pleadings, was one for the jury's determination and not for the court, and that under Rule 50(b) the lower court should have granted a new trial.

In the instant case, even assuming, without conceding the correctness of the ruling of the Court of Appeals in finding insufficient evidence of causal relationship, the court could not direct a verdict but could only order a new trial. The new trial would not only give the district court an opportunity to re-evaluate the question of sufficiency of the evidence, but would permit it to submit to a jury the two other questions of negligence which were properly pleaded and proved, i.e., the question of the unsafe place, as well as the failure to exercise reasonable care in attempting to rescue Johnson after he fell into the water.

CONCLUSION

For the foregoing reasons, the decision of the Court below should be reversed.

Respectfully submitted,

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